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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1247

BOARD OF TRADE OF THE CITY OF CHICAGO,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

MOTION OF THE COFFEE, SUGAR & COCOA EXCHANGE, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the Coffee, Sugar & Cocoa Exchange, Inc. (the "CS&C") respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the petition of the Board of Trade of the City of Chicago (the "Board of Trade") for the issuance of a writ of certiorari to the Court of Appeals for the Seventh Circuit. The Board of Trade consented to the CS&C's appearance as *amicus curiae,* but the respondent Commodity Futures Trading Commission (the "CFTC") has refused such consent.

The question presented by the petition is whether the Seventh Circuit erred when it held that emergency orders issued by the CFTC under Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. §12a(9), to designated contract markets are immune from judicial review. The CS&C is one of only 10 commodity exchanges in the United States designated by the CFTC as contract markets for the trading of futures contracts and will be directly and adversely affected by the Seventh Circuit's decision. It has already been the recipient of one CFTC emergency order and could receive additional emergency orders in the future similar to that directed against the Board of Trade and sustained by the Seventh Circuit.

The CS&C is located in the City of New York and maintains markets for the trading of contracts for the future delivery of coffee, sugar and cocoa. A substantial percentage of the deliverable supply under these contracts is foreign-grown, and both domestic and foreign traders, dealers and users of these commodities are active participants in the CS&C's markets. While the CS&C is the only domestic exchange which has been designated as a contract market for futures trading in these commodities, similar contracts are traded in foreign markets. The CS&C believes that the Seventh Circuit's decision will have substantial and heretofore unconsidered impact upon domestic trading of contracts for the future delivery of international commodities. These considerations were neither adequately briefed by the parties nor addressed by the courts below.

WHEREFORE, the CS&C respectfully requests this Court to permit the CS&C to file the brief *amicus curiae* submitted herewith.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE COFFEE, SUGAR & COCOA EXCHANGE, INC. IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

This brief is submitted on behalf of the Coffee, Sugar & Cocoa Exchange, Inc. (the "CS&C"), as *amicus curiae,* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit filed on February 12, 1980 by the Board of Trade of the City of Chicago (the "Board of Trade").

Preliminary Statement

The petition of the Board of Trade seeks review and reversal of the decision in *Board of Trade of the City of Chicago* v. *Commodity Futures Trading Commission,* 605 F.2d 1016 (7th Cir. 1979), in which the Seventh Circuit concluded that *any* determination by the Commodity Futures Trading Commission (the "CFTC") that a market

"emergency" exists, and *any* action taken by the CFTC predicated upon any such determination, are immune from judicial review. This extraordinary result would obtain even if the CFTC's actions were arbitrary and capricious or beyond its statutory authority.

Question Presented for Review

Whether a determination by the CFTC under Section 8a(9) of the Commodity Exchange Act, 7 U.S.C. § 12a(9), that an emergency exists in a contract market, and orders issued pursuant to that determination, are immune from judicial review.

Nature and Interest of the CS&C

By motion filed herewith, the CS&C seeks leave of this Court to enter its appearance as *amicus curiae* because it believes that the resolution of the question presented for review by the Board of Trade's petition will have substantial impact upon its own futures markets and international economic affairs generally.

The CS&C is the only domestic exchange on which futures contracts for three widely used international commodities—coffee, sugar and cocoa—can be traded in the United States. In 1979, aggregate trading volume on the CS&C was approximately 2,500,000 contracts.*

Although the particular CFTC emergency action which is the subject of the Board of Trade's petition was not directed at trading in any of the CS&C's contracts, the

* This total reflects: 1,825,000 sugar contracts covering 112,000 pounds each; 450,000 coffee contracts covering 37,500 pounds each; 230,000 cocoa contracts covering 30,000 pounds each; and 265 cocoa contracts covering 100 metric tons each.

rationale of the Seventh Circuit's decision, if accepted, might be applied to the CS&C's markets on some future occasion. Since January 1, 1977, the CS&C has itself taken emergency actions with respect to its markets on five different occasions. In one such instance, the CFTC took concomitant action. The CFTC has also taken emergency action in connection with other contract markets, including its recent suspension of grain futures trading following the President's embargo of grain shipments to the Soviet Union, and recently considered whether to take such action with respect to events affecting the silver futures markets. Thus, the question presented for review has continuing significance for all commodities markets.

Argument

The Seventh Circuit's decision is irreconcilable with the decisions of this Court relating to the availability of judicial review of administrative action. If permitted to stand, the Seventh Circuit's rationale would enable the CFTC to intervene in the international commodities markets, such as those maintained by the CS&C, *for any reason and in any manner*, without any opportunity for those directly aggrieved to obtain the basic safeguard of judicial review.

The economic significance of the Seventh Circuit's holding cannot be over-emphasized. In 1979, over 75 million contracts for the future delivery of both domestically and foreign produced goods were traded on United States contract markets by participants in these markets from around the world. Under the decision of the Seventh Circuit, the trading of any futures contract and the reliability of any hedging transaction would be captive to the unreviewable whim of the CFTC. The pertinent provisions of the Commodity Exchange Act, as amended (the "Act"), and its legislative history are barren of any indication that Con-

gress ever intended to confer such unfettered discretion upon the agency.

Under Section 8a(9) of the Act, the CFTC is empowered to

> "direct [a] contract market whenever it has *reason to believe* that an emergency exists, to take such action as, in the Commission's judgment, is *necessary to maintain or restore orderly trading in, or liquidation of, any futures contract*" (emphasis added).

The term "emergency" is defined in Section 8a(9) as

> "threatened or actual market manipulations and corners, [or] any act of the United States or a foreign government affecting a commodity or any other major market disturbance which prevents the market from accurately reflecting the forces of supply and demand for such commodity . . . ."

If this Court fails to repudiate the Seventh Circuit's view that CFTC directives to contract markets under Section 8a(9) are unreviewable, the CFTC will be free, at its pleasure, to intervene in the United States commodities markets, safe in the knowledge that its assertion of extraordinary powers cannot be contested in the courts for any reason. Such unchecked power could have devastating effects.

The CFTC emergency action here, had it become effective, would have required termination of all trading in the Board of Trade's March 1979 wheat futures contract and settlement of all outstanding contracts at an administratively decreed price. After the district court enjoined enforcement of the CFTC order, the market proceeded to liquidate on its own in an orderly fashion. Wall St. J., Mar. 22, 1979, at 38, col. 5. If the Seventh Circuit's

decision had been rendered earlier, this result would have been foreclosed. Because of the sequence of events, one cannot measure with precision the market impact that the CFTC's action would have had if it had become effective. According to the Seventh Circuit, however, the courts would have been unable to act regardless of the nature or extent of the ensuing impact.

The recent turmoil in the silver futures markets again focused international attention on the CFTC's emergency powers and illustrated the significance and timeliness of the issue presented for review by the Board of Trade's petition. Published reports indicated that the CFTC expressly considered whether to take emergency action during this crisis. *E.g.*, N.Y. Times, Mar. 29, 1980, at 1, col. 1 and 32, col. 3. Presumably, the CFTC could have decided to issue an order in the silver futures situation similar to the emergency action sought to be imposed on the Board of Trade in this case—termination of all trading and settlement of all outstanding silver futures contracts at a price set by the CFTC. Depending upon the price selected, such action could have rendered innumerable silver traders and several major futures commission merchants insolvent, and produced incalculable disruptions in the international commodities, equity and financial markets.

Under this Court's prior decisions, any such far reaching governmental action would be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, unless the CFTC could somehow satisfy the "heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [the agency] decision." *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). This burden must be met by "clear and convincing evidence." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). The plain fact is that the Act's

legislative history fails to disclose an intent to preclude judicial review and cannot support the CFTC's attempt to rebut the "strong presumption" of reviewability.

No provision of the Act expressly precludes judicial review of CFTC orders under Section 8a(9). Rather than evidencing a Congressional desire to confer unreviewable authority upon the CFTC, the unmistakable message of the legislative history of Section 8a(9) is that Congress was deeply concerned that "the users of the futures markets will be reluctant to continue to depend on the markets if they feel that their contracts will be violated and abrogated by arbitrary governmental action." S. Rep. No. 93-1131, 93d Cong., 2d Sess. 25, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5843, 5865-66. The Senate Committee Report contained the following explicit admonitions:

> "[T]he Commission is not to exert its extraordinary emergency powers except when it is clear that threatened or actual market manipulations and corners or other major market disturbances will in fact disrupt the markets and adversely affect the legitimate users of the markets.
>
> "Also, *the Commission must be particularly careful in dealing with commodities traded on international exchanges,*[*] *for it should not take any 'emergency' action that would drive trading out of exchanges in the United States." Id.* at 26, [1974] U.S. Code Cong. & Ad. News at 5866 (emphasis added).

Similarly, the Conference Committee made plain that an arbitrary judgment could not be the basis for Section 8a(9) action, but rather that such action must be premised

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* The CS&C is one of the "international exchanges" referred to by the Senate Committee.

upon "the careful exercise of expert and impartial judgment . . . ." H.R. Rep. No. 93-1383, 93d Cong., 2d Sess. 38, *reprinted in* [1974] U.S. Code Cong. & Ad. News 5894, 5900. Given such legislative pronouncements, it is inconceivable that in enacting Section 8a(9) Congress opted *sub silentio* for administrative absolutism.*

There has been no demonstration that Congress intended "to transfer its legislative power to the unbounded discretion" of the CFTC, *see FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), or to commit the exercise of vast emergency powers "'*entirely* to administrative discretion.'" *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977), *quoting Barlow* v. *Collins*, 397 U.S. 159, 165 (1970) (emphasis added). Nor has this Court ever countenanced the peacetime assertion of unbridled authority over vital segments of our economic lives. The CS&C asks this Court to reassert its commitment to the well-established limits upon governmental authority and to reject the CFTC's claim to unreviewable power.

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* The fact that certain discretionary authority has been conferred upon the CFTC within its regulatory sphere does not mean that its exercise of such discretion is free from all legal constraints. Indeed, a contrary holding would effectively emasculate Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), which empowers a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, *an abuse of discretion,* or otherwise not in accordance with law" (emphasis added).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition of the Board of Trade for a writ of certiorari to the Seventh Circuit be granted.

Respectfully submitted,

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